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NO. 1022

SUPREME COURT OF THE UNITED STATES

October Term 1961

The Board of Education of The City of Memphis, et al.,

Petitioners,

vs.

Deborah A. Northcross, et al.,

Respondents.

APPENDIX

To

PETITION FOR WRIT OF CERTIORARI

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In the

United States District Court

In and for the Western District of Tennessee

Memphis Division

Deborah A. Northcross, *et al.*,

Plaintiffs,

—v.—

The Board of Education of the City of Memphis, *et al.*,

Defendants.

Complaint

I

The jurisdiction of this court is invoked pursuant to the provisions of Title 28, United States Code, §1343(3), this being a suit in equity authorized by law. Title 42, United States Code, §1983, to be brought to redress the deprivation under color of law, statute, regulation, custom and usage of a estate of rights, privileges and immunities secured by the Constitution and laws of the United States. The rights, privileges and immunities sought to be secured in this action are rights, privileges and immunities guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution as hereinafter more fully appears.

II

This is a proceeding for a permanent injunction enjoining defendants from continuing to pursue the policy, practice, custom and usage of operating a compulsory biracial school system in Memphis, Shelby County, Tennessee, in violation of rights secured to plaintiffs by the Constitution and laws of the United States referred to above, as hereinafter more fully appears.

III

Plaintiffs in this case are the eighteen minors and their parents named in the caption of this complaint. Suit is brought on behalf of the minors by a parent of each as next friend. Plaintiffs are all citizens of the United States and the State of Tennessee, residing in Memphis, Shelby County, Tennessee. Plaintiffs are all members of the Negro race and bring this action on their own behalf and on behalf of all other Negro children and their parents in Memphis, Shelby County, Tennessee, similarly situated and affected by the policy, practice, custom and usage complained of herein. The minor plaintiffs and other minor Negro children similarly situated are eligible to attend and are now attending public schools in Memphis, Shelby County, Tennessee, which are under the jurisdiction, management and control of defendants and which are limited by defendants to attendance by Negro children only. Plaintiffs and members of their class are so numerous that it is impracticable to bring them all individually before this Court, but there is a common question of law and fact involved, a common grievance arising out of a common wrong, and a common relief is sought for each plaintiff and for each member of the class. The plaintiffs herein fairly and adequately represent the members of the class on behalf of which they sue.

IV

Defendant Board of Education of the City of Memphis, Shelby County, Tennessee, is a public body corporate organized and existing under the laws of the State of Tennessee. Defendant Walter P. Armstrong is the president of said Board and John T. Shea, Frances E. Coe, James S. Seessel, and Julian Bondurant are members of said Board. Defendant E. C. Stimbert is the Superintendent of the Memphis public school system. All defendants are charged by law with the duty of operating a system of free public education in the City of Memphis and are presently operating public schools in said city pursuant to the laws of the State of Tennessee.

V.

Plaintiffs allege that the defendants herein, acting under color of the laws of the State of Tennessee, have pursued and are presently pursuing a policy, practice, custom and usage of operating a compulsory biracial school system in the City of Memphis. The compulsory biracial school system operated by defendants consists of a primary system of elementary and high schools limited to attendance by white children of the City of Memphis. Said schools are staffed by white teachers, white principals and white sustaining personnel. Said white schools are located in various parts of the city and, regardless of location, these schools may be attended by white children only. The defendants also maintain a secondary system of "colored schools" or "Negro schools" limited to attendance by Negro children. These schools are likewise located in various parts of the city and, regardless of location, are limited to attendance by Negro children. These schools are staffed entirely by Negro personnel. The teachers are all Negroes, the principals are

all Negroes, and the sustaining personnel are all Negroes. The compulsory biracial school system is based solely upon race and color. Attendance at the various schools is determined solely upon race and color and the assignment of personnel is determined solely upon the race and color of the children attending the particular school and the race and color of the personnel to be assigned. A dual set of school zone lines is also maintained. These lines are based solely upon race and color. One set of lines relates to the attendance areas for the Negro schools and one set to the attendance areas for the white schools. These lines overlap where Negro and white school children reside in the same residential area.

VI

Plaintiff, Marjorie McFerrin, individually applied for the assignment of her child, Gerald McFerrin, to Vollentine Elementary School, which is an elementary school limited to attendance by white students and is located in the "white" school zone in which the minor plaintiff lives. This minor plaintiff was denied a transfer from Hyde Park Elementary School to Vollentine Elementary School solely because he is a member of the Negro race.

VII

All plaintiffs, together with many other members of the class which the plaintiffs represent, petitioned the Board of Education of the City of Memphis, and each of its members, in writing, on December 10, 1959, to comply with the decision of the United States Supreme Court in the School Segregation Cases by desegregating the public elementary and high schools of the City of Memphis. On February 8, 1960, some of the plaintiffs appeared at a meeting of the

Board of Education at which they again requested the Board to comply with the decisions of the United States Supreme Court in the School Segregation Cases and to end the policy, practice, custom and usage of operating the school system of Memphis, Tennessee, on a racially segregated basis.

The defendant Board of Education has failed and refused to take any steps to eliminate the dual school system in the City of Memphis, and the Board has failed and refused to present a plan for reorganization of the school system into a unitary, nonracial school system as required by said decisions.

VIII

The plaintiffs have not exhausted the administrative remedy provided by the Tennessee Pupil Assignment Law for the reason that the remedy there provided is inadequate to provide the relief sought by plaintiffs in this case. Plaintiffs have not exhausted the remedy provided by the Tennessee Pupil Assignment Law for the further reason that the criteria set forth in the Tennessee Pupil Assignment Law for assigning children to school have been and are applied by defendants only to Negro children seeking admission, assignment or transfer to white schools and have not been and are not applied by defendants to white children seeking admission, assignment or transfer to white schools. Plaintiffs allege that acting under color of the authority conferred upon them by the Tennessee Pupil Assignment Law, defendants have continued to maintain and operate a compulsory biracial school system in the City of Memphis, and have used the provisions of this law to deny admission of Negro children to certain schools solely

because of race and color, and have used this law to defeat rather than attain full compliance with the decisions of the United States Supreme Court in the School Segregation Cases. Defendants have not employed the Pupil Assignment Law as a means of abolishing state imposed race distinctions nor have they offered to plaintiffs by means of the Pupil Assignment Law a genuine means of securing attendance at nonsegregated public schools. Plaintiffs further allege that all children presently attending public elementary and high schools in Memphis have been assigned on the basis of race and color, despite the existence of a Pupil Assignment Law.

IX

Plaintiffs allege that all of defendants' budgets relating to the operation of the schools are based upon race and color and the fact that there is in operation a compulsory biracial school system. All new school construction plans proposed, adopted and executed by defendants are based upon the fact that there is in operation a compulsory biracial system of schools. All funds appropriated and expended by defendants are also appropriated and expended by defendants separately for Negro schools and separately for white schools.

X

Plaintiffs allege that many parts of the school curriculum are open only to white pupils and teachers.

XI

Plaintiffs, and members of the class which they represent, are injured by the refusal of defendants to cease operation

of a compulsory biracial school system in the City of Memphis. The compulsory biracial school system is predicated on the theory that Negroes are inherently inferior to white persons and, consequently, may not attend the same public schools attended by white children who are superior. The plaintiffs, and members of their class, are injured by the policy of assigning teachers, principals and other school personnel on the basis of the race and color of the children attending a particular school and the race and color of the person to be assigned. Assignment of school personnel on the basis of race and color is also predicated on the theory that Negro teachers, Negro principals and other Negro school personnel are inferior to white teachers, white principals and other white school personnel and, therefore, may not teach white children.

The injury which plaintiffs and members of their class suffer as a result of the operation of the compulsory biracial school system in the City of Memphis and as a result of the policy of assigning school personnel on the basis of race is irreparable and will continue until enjoined by this Court. Any other relief to which the plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience, not only to plaintiffs and those similarly situated, but to defendants as public officials.

WHEREFORE, plaintiffs respectfully pray that this Court advance this cause on the docket and order a speedy hearing of this action according to law and after such hearing:

1. Enter a decree enjoining defendants, their agents, employees and successors from operating a compulsory biracial school system in Memphis, Shelby County, Tennessee.

2. Enter a decree enjoining defendants, their agents, employees and successors from maintaining a dual scheme or pattern of school zone lines based upon race and color.

3. Enter a decree enjoining defendants, their agents, employees and successors from assigning pupils to schools in the City of Memphis on the basis of the race and color of the pupils.

4. Enter a decree enjoining defendants, their agents, employees and successors from assigning teachers, principals and other school personnel to the schools of the City of Memphis on the basis of the race and color of the personnel to be assigned and on the basis of the race and color of the children attending the school to which the personnel is to be assigned.

5. Enter a decree enjoining defendants, their agents, employees and successors from subjecting Negro children seeking assignment, transfer or admission to the schools of the City of Memphis to criteria, requirements, and prerequisites not required of white children seeking assignment, transfer or admission to the schools of the City of Memphis.

6. Enter a decree enjoining defendants, their agents, employees and successors from approving budgets, making available funds, approving contracts, and policies, de-

signed to perpetuate or maintain or support a school system operated on a racially segregated basis.

In the alternative, plaintiffs pray that this Court enter a decree directing defendants to present a complete plan, within a period of time to be determined by this Court, for the reorganization of the entire school system of Memphis, Shelby County, Tennessee, on a unitary, nonracial basis, which shall include the assignment of children on a nonracial basis, the assignment of teachers, principals and other school personnel on a nonracial basis, the drawing of school zone lines on a nonracial basis, and the elimination of any other discriminations in the operation of the school system based solely upon race and color. Plaintiffs pray that if this Court directs defendants to produce a desegregation plan that this Court will retain jurisdiction of this case pending approval and full implementation of defendants' plan.

Plaintiffs pray that this Court will allow them their costs herein and grant such further, other, additional or alternative relief as may appear to this Court to be equitable and just.

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IN THE

UNITED STATES DISTRICT COURT

IN AND FOR

THE WESTERN DISTRICT OF TENNESSEE

MEMPHIS DIVISION

DEBORAH A. NORTHCROSS and THERON W. NORTHCROSS, JR., Minors, by T. W. NORTHCROSS, SR., their father and next friend,

and

WILLIAM O. SPEIGHT, III, a Minor, by W. O. SPEIGHT, JR., his father and next friend,

and

ETTA SUE ISH, a Minor, by G. W. STANLEY ISH, JR., her father and next friend,

and

ALLEN JEROME CHRISTIAN and NATHANIEL CHRISTIAN, JR., Minors, by WILMA CHRISTIAN, their mother and next friend,

and

ARTHUR R. FLOWERS, JR., DENISE FLOWERS, and ELISE FLOWERS, Minors, by A. R. FLOWERS, SR., and ELOISE FLOWERS, their natural parents and next friends,

and

GERALD E. McFERRIN, a Minor, by MARJORIE McFERRIN, his mother and next friend,

and

ARTHUR E. HORNE, JR., MURIEL PHYLLIS HORNE, and JANET FAYE HORNE,

CIVIL ACTION NO. 3331

Minors, by A. E. HORNE, SR., their father and next friend,)

and

JAMES YARBROUGH, FRANCES MARIE YARBROUGH, SHERMAN W. DOTSON, GLORIA JEAN YARBROUGH, and THOMAS LEWIS YARBROUGH, Minors, by ODELL DOTSON, their grandfather and next friend,)

Plaintiffs,)

vs.

THE BOARD OF EDUCATION OF THE CITY OF MEMPHIS, a body corporate, and WALTER P. ARMSTRONG, President of the Board of Education of the City of Memphis, JOHN T. SHEA, FRANCES E. COE, JANE S. SESSEL, JULIAN BONDURANT, Members of the Board of Education of the City of Memphis, and E. C. STIMBERT, Superintendent of Memphis School System,)

Defendants.)

ANSWER

Answer

Come the defendants and for their answer to the Complaint filed herein against them, respectfully show to the Court:

I.

Defendants admit that the jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Sec. 1343(3) and that this is a suit in equity authorized by Title 42, United States Code, Sec. 1983; but defendants deny that there has been or is now a deprivation under color of law, statute, regulation, custom and usage of a state of rights, privileges and immunities secured by the Constitution and laws of the United States in the manner and form alleged, or in any other manner and form; and defendants deny that rights, privileges and immunities guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution, or any other law, have been denied to plaintiffs.

II.

Defendants deny that they have pursued a policy, practice, custom and usage of operating a compulsory biracial school system in Memphis, Shelby County, Tennessee, and deny that they have violated any rights secured to plaintiffs by the Constitution and laws of the United States, or any other laws; but on the contrary, defendants would show that they have never denied to any person the right to attend a particular school on account of race or color.

III.

Defendants deny that plaintiffs herein fairly and adequately represent the members of the class on behalf of

which they sue; and deny that plaintiffs should have the right to maintain this cause as a class action.

IV.

Defendants admit the allegation contained in the paragraph numbered "IV" of the Complaint relating to the status of the parties and the obligation of defendants with respect to the operation of the public school system in the City of Memphis.

V.

Defendants deny each allegation contained in Paragraph V of the Complaint. In that connection defendants would show that prior to the decision of the Supreme Court of the United States in *Brown, et al.*, v. *Board of Education of Topeka, et al.*, defendants were obligated under Article XI, Section 12, of the Constitution of Tennessee and General State Law as well as under the provisions of the Charter granted to defendant, Board of Education of the Memphis City Schools, by the State Legislature in 1869 to operate a compulsory biracial school system; that by virtue of the decision in said case of *Brown* v. *Board of Education of Topeka* state Constitutions and statutes of such type directing compulsory segregation were held to be in derogation of the Constitution of the United States; thus, defendants recognize that they can no longer act under said constitutional provisions or statutes. Defendants admit that certain of its schools are attended and staffed solely by members of the white race and certain of its schools are attended and staffed by persons only of the Negro race; but since said Supreme Court decision defendants have not

compelled members of a particular race to attend a given school solely because of race as alleged in the Complaint. Though, as heretofore stated, certain schools are attended by members of a particular race, said attendance results not from compulsion but is entirely voluntary and flows from the desire on the part of a member of one race to associate and attend schools with members of his own race. For defendants arbitrarily to assign a Negro child to a school attended predominantly by white children, or to assign a white child to a school attended predominantly by Negro children could only constitute compulsory integration which defendants are advised is not required under the law, their sole obligation under the School Segregation Cases being to not deny to any person, on account of race, the right to attend any school that they maintain.

VI.

Defendants admit that plaintiff Marjorie McFerrin applied for the assignment of her child, then Gerald E. Young, to Vollentine Elementary School; that the said Gerald E. Young had attended Hyde Park Elementary School for three years and prior to her request to enter him in Vollentine School he had been assigned to attend the school which he had previously attended and, in fact, had registered to attend said school; that the said plaintiff then requested the Superintendent to re-assign her child to Vollentine, giving as her reason that it would be "more convenient". In this connection defendants would show that for many years, it has been the policy of the Board of Education to deny a request to transfer a student from one school to another on the mere grounds of convenience and literally thousands of such applications made on behalf

of both white and Negro children have been denied by the Board or its staff in times past, such denials being based solely on the aforementioned policy of the Board of Education without relation to race or color; and that the application of the McFerrin child referred to in Paragraph VI of the Complaint was denied by virtue of the policy of the Board of Education unrelated to the question of race. Defendants would further show that the transfer sought by plaintiff McFerrin was denied by the staff of the Board of Education and said plaintiff did not appeal that action to the Board of Education as she was authorized to do under the Pupil Placement Law, being Section 49-1701, et seq., Tennessee Code Annotated.

VII.

Defendants admit that they received the petition referred to in the paragraph number "VII" of the bill; and that on February 8, 1960, some of the plaintiffs appeared at a meeting of the Board where a lengthy hearing was accorded plaintiffs on the subject of the school system in this community; that at said meeting plaintiffs were advised by defendant Walter P. Armstrong, President of the Board of Education, that the school system was being operated under the Pupil Placement Law of the State of Tennessee, and plaintiffs were advised in unequivocal terms that plaintiffs' application for enrollment in a particular school would be considered by the Board in good faith and in accordance with law, both State and Federal.

VIII.

Defendants admit and, in fact, urge upon the Court that plaintiffs have not exhausted the administrative remedies

provided by the Tennessee Pupil Assignment Law. The exhaustion of such administrative remedies is a condition precedent to maintaining this action and for that reason plaintiffs' Complaint should be dismissed.

Defendants deny that the remedy afforded plaintiffs under said Pupil Assignment Law is inadequate; deny that the criteria set forth in said Assignment Law for assigning children to school has been or will be applied by defendants only to Negro children seeking assignment or transfer to white schools and, further, deny that the provisions of said Pupil Assignment Law have not been and are not applied by defendants to white children seeking assignment or transfer to white schools.

Defendants deny that acting under color of the authority conferred upon them by said Assignment Law, defendants have continued to maintain and operate a compulsory biracial school system in the City of Memphis; deny that they have used the provisions of this law to deny admission of Negro children to certain schools solely because of race or color; and deny that they have used this law to defeat compliance with the decisions of the United States Supreme Court in the School Segregation Cases; but on the contrary defendants would show that they have offered plaintiffs a genuine means of having their application to secure attendance at public schools considered in good faith through said Assignment Law; and that not one of the plaintiffs has made an effort to comply with said Law.

Admittedly, there are schools attended by persons of a single race but even until the filing of this Answer, no effort

nor proper application has been made by a member of the Negro race to attend a school attended by white students, nor of a white person to attend a school attended by Negro students, and it is impractical and impossible for defendants to pick here and there certain school children and integrate them whom these defendants have no way of knowing whether such selected children desire such involuntary and compulsory integration.

The Tennessee Pupil Placement Law affords to plaintiffs and defendants a simple and easy method of complying with the decisions of the United States Supreme Court in the school segregation cases while accomplishing at the same time the desired objective of leaving the operation and management of the local school system in the hands of local officials controlled by local laws, so long as those local laws are not violative of the Constitution of the United States.

Defendants would show that not only have plaintiffs failed to exhaust the administrative remedy provided for them but they have made no effort whatsoever even to initiate the said administrative remedy.

IX.

Defendants deny the allegations contained in Paragraph IX of the Complaint and, particularly, do defendants deny the operation of a compulsory biracial school system, though defendants concede that, in fact, there is no racial integration of its schools for the simple reason that no application has been made to defendants by a member of the Negro race to attend a white school and defendants do

not feel that they are obligated to introduce compulsory integration, selecting here and there certain students to integrate a school on an involuntary basis.

X.

Defendants deny the allegations contained in the paragraph numbered "X" of the Complaint that many parts of the school curriculum are open only to white pupils and teachers and would show that defendants have never denied to any student, white or Negro, any reasonable course for which that student is suited and which accords with what the Board of Education considers to be a legitimate educational objective and a justifiable expenditure of public funds.

XI.

With reference to the allegations contained in the paragraph numbered "XI" of the Complaint, defendants again reiterate that they are not operating a compulsory biracial school system nor do defendants believe nor act upon the theory that Negroes are inherently inferior to white persons, thus may not attend public schools attended by white children, or that white children are superior. Further, defendants deny that plaintiffs are injured by the policy of assigning teachers, principals and other personnel on the basis of the race and color of the children attending a particular school and the race and color of the person to be assigned; and defendants, likewise, deny the alleged inferiority of their Negro teachers, principals and other school personnel but on the contrary would show that their Negro principals, teachers and other personnel are ably fitted for the positions which they hold.

Answer

On the contrary, defendants verily believe that they have one of the finest school systems in the United States; that the buildings, equipment, principals, teachers and personnel are the finest obtainable considering the financial conditions of this community.

XII.

All allegations of the Complaint not herein either specifically admitted or denied are here and now generally denied; and denied as fully as though specifically denied herein.

And now having fully answered, the defendants pray to be hence dismissed.

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Ruling of the Court

Thereupon, the Court announced the following ruling:

THE COURT: Well, gentlemen, we have had a full hearing of this case and here briefly are the Court's views about it.

Ruling of the Court

Of course, as is well known to all, the races have been separated in the Memphis Schools for many years. Several years ago the Supreme Court ruled in the celebrated Brown case that a state agency may not deny a child the right to attend the public school of his choice because of race or color. The law by now should be clear enough to all, and our problem in this proceeding, it seems to the Court, is to consider and decide, within the pleadings, ways and means of implementation whereby the Supreme Court's ruling may with all deliberate speed be made effectual with regard to the Memphis Schools.

Now, the parties are not in accord as to how this should be done. The defendant board members who are charged with the responsibility of operating the vast Memphis school system and upon whom the primary responsibility rests, are as far as the Court can tell fully resigned to the Supreme Court's decision and are definitely desirous of cooperating to the end that the transition from the segregated school to the integrated school be accomplished with dispatch and that the numerous problems incident to such a changeover be kept to a minimum.

The defendant board members are of the opinion that these things may be accomplished more expeditiously and more satisfactorily through resort to the Tennessee Placement Act of 1957 and are asking in this proceeding that the plaintiffs be first required to exhaust any available remedies under that Act. The defendants, as a matter of fact, deny they are operating a compulsory bi-racial school system. They say that for quite some time they have operated under the so-called Pupil Placement Act of the

State of Tennessee, and that its position on this has not been a secret, but generally known to the public, including the plaintiffs in this case. They say school personnel since the effective date of the Pupil Placement Act were given instructions by the Board that thenceforth the provisions of that law would govern the operation of the Memphis school system. They say the Board has since the effective date of the Placement Act attempted to and has operated under that act.

The defendants are asking that this complaint be dismissed because exhaustion of administrative remedies under the Placement Act is a condition precedent to the maintenance of this case.

The plaintiffs, it should be said, are seeking broad injunctive relief in this proceeding which would require immediate integration of all grades of all the public schools in the City of Memphis, and in the alternative are asking that the defendants be directed to present a complete plan for desegregation, or, more accurately, a plan for compulsory integration of the Memphis school system.

Now, the plaintiffs carry the burden with respect to the matters alleged in their complaint. And the Court would think the burden in this proceeding is upon the defendants to show the Placement Act is adequate to take care of the situation and that operations under it are feasible.

The plaintiffs seem to be apprehensive as to how the colored children will fare under the Placement Act. They are opposed to the handling of the matter under that Act.

Ruling of the Court

The plaintiffs' feelings in this regard seem to be based, as the Court sees it, not so much upon experience or upon what is shown to have occurred, as upon what they fear will occur. They take the position the placement law can only operate to maintain segregation in the Memphis schools, a device, so to speak, to evade the Supreme Court's decision.

In this connection, and as an example, they claim there was an application in September, 1958, on the part of the McFerren child for a transfer from a colored to a white school on grounds of convenience. Now, we have heard the proof with respect to this single isolated case. In the Court's view the superintendent's denial of the request on the grounds of convenience seems to have been in accordance with the long established policy of the Memphis Board of Education, and after the application of the factors provided for in the Pupil Placement Act here in question. However, that may be, it appears to the Court the superintendent acted properly and in accordance with good school administration in this instance. And it should be pointed out there was no effort to pursue the matter further by appeal to the Board of Education as might have been done under the Placement Act.

Well, the handling of the McFerren case by the superintendent is not proof in the Court's opinion of bad faith on the part of the defendants in the application of the provisions of the Tennessee Placement Act, if that is the purpose of its introduction into this proceeding.

The plaintiffs admit they have not in any case sought to take advantage of the provisions of the Pupil Placement

Act of Tennessee. In other words, they admit they have not availed themselves of the processes or remedies afforded by that law in respect to any single child. There seems to be no controversy about these things.

Now, it should be stated we have a very excellent Board of Education in the City of Memphis. It is made up of outstanding, dedicated citizens of good will, all of whom no doubt serve at considerable sacrifice. Their good faith with respect to the position they have taken concerning this matter the Court would say is not seriously questioned, if at all. When they assure this Court that any factors with respect to assignments of pupils under the Pupil Placement Act will be applied to both white and colored applicants alike, for either initial enrollment in a particular school or a transfer to another school, the Court is well satisfied it will be just that way. There is no evidence whatever that these factors or tests, as they have been referred to in the course of this proceeding, will be applied discriminately as between the races. The Court has full confidence in the members of the Memphis Board of Education and accepts their statements and representations in this matter at full face. The character of those in charge is all important, and the Court is firmly of the belief the Memphis Board of Education will administer its affairs under the Placement Act fairly and efficiently and impartially and without regard to race or color. The Court thinks they are entitled to continue their operations under the Act and to have an opportunity to show what they can do. It is much better within the framework of the state law, under which the governing rules are already spelled out and under which an aggrieved party may take his complaint all

the way to the state Supreme Court. A colored child has but to apply for initial entrance or transfer as is required of white children.

Without some such plan, the Court, for one thing, may find itself in the business of operating the Memphis schools. And of course this was never intended and should be avoided if at all possible.

The Court of Appeals in the Fourth Circuit, presided over by the late Chief Judge John Parker, one of the greatest judges of them all, in dealing with a somewhat similar case in North Carolina, very appropriately put it this way in this case of Carson vs. Board of Education, cited here today, and reported in 227 Federal 2nd 789,— incidentally, the North Carolina Pupil Placement law was under consideration in that case,—and I read a paragraph:

"In further consideration of the case, however, the District Judge should give consideration not merely to the decision of the Supreme Court but also to subsequent legislation of the State of North Carolina providing an administrative remedy for persons who feel aggrieved with respect to their enrollment in the public schools of the state. The Act of March 30, 1955, entitled, "An Act to Provide for the Enrollment of Pupils in Public Schools", being chapter 366 of the Public Laws of North Carolina of the Session of 1955, provides for enrollment by the county and city boards of education of school children applying for admission to schools, and authorizes the boards to adopt rules and regulations with regard thereto. It further provides for application to and prompt hearing by the board in the case of any child whose admission to any public school within the county or city administrative unit had been denied, with

right of appeal therefrom to the Superior Court of the county and thence to the Supreme Court of the state. An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted."

Citing Myers vs. Bethlehem Shipbuilding Corporation, 303 U. S. 41;

Natural Gas Pipeline Company of America vs. Slattery, 302 U. S. 300;

Hageman Farms Corporation vs. Baldwin, 293 U. S., 163;

United States vs. Illinois Central Railroad Company, 291 U. S. 457;

Peterson Baking Company vs. Bryan, 290 U. S. 570;

Porter vs. Investors' Syndicate, 286 U. S. 461;

Matthews vs. Rodgers, 284 U. S. 521;

Prentiss vs. Atlantic Coast Line Railroad Company, 211 U. S. 210.

The Court, as you can see, cites I believe eight cases, eight Supreme Court cases.

A still later case from the Court of Appeals of the Eighth Circuit, case cited during the argument, Parham vs. Dove, reported in 271 Federal 2nd 132, is very much in point. The Pupil Placement Act of the State of Arkansas was under consideration in that case.

Our own Court of Appeals in recent years, the Court might point out here, affirmed Judges Darr and Miller

from other districts in Tennessee on this question concerning the exhaustion of administrative remedies in Thomas vs. Chambers, 236 Federal 2nd, and Donelson vs. United States, 264 Federal 2nd.

Now, it is important in these remarks that we not overlook the Shuttlesworth case cited. This, as has been pointed out, is a case strikingly similar to this one. It, for one thing, recognized the legal principle with which we are dealing in respect to administrative remedies.

The Alabama Placement Act was under consideration in that case and was ruled a valid law from the constitutional standpoint. The Supreme Court of the United States, as pointed out by Mr. Creson, affirmed the judgment of the three-judge court in the Shuttlesworth case, and its action is reported in 348 U. S. So it would seem that the courts are agreed on this particular proposition.

Of course, Judge William Miller was dealing with a very different situation in the cited Nashville case. He ruled the administrative remedies under the Placement Act were not adequate in that case because the Nashville Board of Education had, among other things, never abandoned a policy of compulsory segregation in the public schools of that city and was at the time of the hearing committed to a policy of compulsory segregation.

Nothing like this is present in our case. The Memphis Board has never had any such attitude or policy. On the contrary, the Memphis Board of Education openly announced many months ago its desire to integrate the Memphis schools through compliance with the Pupil Placement

Law, and has attempted to do so, and makes its position in this court proceeding crystal clear.

The Memphis Board, the Court feels, has fully realized it is under a clear legal duty to initiate and to bring about an elimination of racial segregation. The Court finds it has already done that, as a matter of fact, when they set up operations under the Tennessee Pupil Placement plan.

It should be pointed out that Judge McAllister in his opinion affirming Judge Miller in the Kelly case, incidentally, said cases involving desegregation, like others, depend upon facts of each particular case.

Now, Judge Darr's opinion has been cited. Judge Darr, of the Eastern District of this state, I think did on motion for summary judgment find the Pupil Placement Act of Tennessee inadequate. Judge Darr found, in effect the school board of Chattanooga was opposed to integrating its schools, was not operating under the Pupil Placement Act of Tennessee, and was making no attempt to do so; and further, that denials of the school board to admit colored children to white schools were because of race and color rather than a failure to comply with the Placement Act. But again, in our case the facts developed in the Chattanooga case are not similar at all.

The Court will go along with the Memphis Board of Education in its desire to continue in an orderly manner under the Tennessee Placement Laws. The defendants in this hearing have carried any burden required of them, in the Court's opinion. The Court thinks the state law furnishes a sound and complete plan, fully adequate to insure a fair

deal to the colored pupils of this community. It certainly is as good as can be done in view of the obstacles to be overcome. The Court feels it is much better than the grade-a-year plans we hear so much about and which are now in effect in a number of places. Indeed, it appears in and of itself an adequate plan which the plaintiffs in the alternative insist the defendants should submit.

The defendants' position with respect to the Tennessee Placement Law is sustained.

The Court hopes very much all concerned will now cooperate to the end that the provisions of the Tennessee Placement Act will be observed in Memphis and that we can go forward with the education of our children without discrimination.

What the Court has said in this general way will suffice, at least for the present, as its findings and conclusions under the rules. Mr. Petree, others in more detail are probably necessary, and the Court feels they should be prepared and filed with the Court.

* * * * *

(ADJOURNMENT)

Findings of Fact and Conclusions of Law

This cause came on to be heard by the Court sitting without a jury. This is a suit in which the plaintiffs seek an injunction against the defendants, being the Board of Education of the Memphis City Schools and the individual members and superintendent thereof, enjoining the defendants from operating a compulsory bi-racial school system in Memphis, Tennessee, and in the alternative plaintiffs ask that the Court direct the defendants to present a plan for desegregation, or more accurately, a plan for compulsory integration of the Memphis school system.

In their answer, defendants deny that they operate a compulsory bi-racial school system. Defendants admit that the school system is not racially integrated for the reason that no application has been made by a member of one race to attend a school attended solely by members of another race and defendants do not believe that they are obligated to introduce compulsory integration.

Defendants admitted the allegation of the Complaint that plaintiffs have not exhausted the administrative remedy afforded them under the Pupil Assignment Law, being Sections 49-1741, et seq., Tennessee Code Annotated, and that such willful failure or refusal is fatal to their Complaint, particularly in view of the public assurances given to plaintiffs and their counsel that this Act would be administered on a non-racial basis.

The Court, upon the pleadings, evidence and arguments of counsel, makes the following:

Findings of Fact

I. Defendant, Board of Education of the Memphis City Schools, is a corporation chartered by the General Assembly of the State of Tennessee, and is vested with the management and control of the school system in said City.

II. The plaintiff, Mrs. Marjorie McFerren, being the only one of the parties plaintiff who testified, is a resident of Memphis, Tennessee, and is the mother of Gerald E. Young, incorrectly referred to in the Complaint as Gerald E. McFerren; and the said Gerald E. Young attends the school system operated by defendants. There is no evidence in the record of the true residence of the remaining plaintiffs nor is there evidence as to the status of the plaintiffs as pupils in the Memphis School System.

III. Defendants do not operate a compulsory bi-racial school system; nor do defendants maintain a dual schedule or pattern of school zone lines based upon race or color; nor do defendants assign pupils to the schools in the City of Memphis on the basis of the race or color of the pupils; nor do defendants assign teachers, principals and other school personnel to their school system on the basis of race or color of the personnel to be assigned and on the basis of race and color of the children attending the schools to which the personnel is to be assigned; nor do defendants subject Negro children seeking assignment, transfer or admission to the schools of the City of Memphis to criteria, requirements and prerequisites not required of white children seeking assignment, transfer or admission to the schools of the City of Memphis; nor do defendants approve budgets, make available funds, approve contracts and policies which are designed to perpetuate, or maintain, or sup-

port a school system operated on a compulsory racially segregated basis.

IV. The Memphis Public School System is the fifteenth largest system, in terms of pupil enrollment, in the United States. Its enrollment as of June 6, 1960, was as follows:

Gross enrollment—107,090[1]
Net enrollment—101,907[2]
Membership enrollment—95,203[3]
Average membership enrollment—95,317[4]
Average number present—90,501[5]
Average number absent—4,812[6]

The percentage of non-white enrollment in the Memphis city schools as of June 6, 1960, was as follows:

Gross enrollment—43.7%
Net enrollment—43.4%

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1. *Gross enrollment*: The gross enrollment is increased every time a student originally enrolls in any Memphis City Schools, including transferring from one school within the Memphis City School System to another. The gross enrollment is not reduced at any time that a student either leaves the Memphis School System or transfers within the system to another school.

2. *Net enrollment*: Net enrollment includes only original enrollment in the school system during the year. Students who transfer within the school system and who re-enter are not counted the second time in the net enrollment. The net enrollment is not decreased at any time a student leaves a given school or the school system.

3 *Membership (20th day)*: The actual number of students in attendance on the 20th day of the pupil accounting period.

4 *Average membership enrollments* Computed by dividing total number of days belonging (this term means the number of days that the students on roll belonged in school) by the number of days in the period (20).

5 *Average number present*: The Average Daily Attendance is determined by taking the total days present and dividing by the number of days in the period.

6 *Average number absent*: The average number absent is determined by taking the total days all pupils were absent and dividing by the number of days in the period.

Membership (20th day)—44.2%
Average membership—44.2%
Average number present—43.8%
Average number absent—50.7%

V. The school zone maps introduced in the cause have no significance as evidence of a compulsory bi-racial school system. The sole purpose of such zone maps is to provide an area containing school population adequate for the efficient and economical utilization of the facilities and personnel of a particular school.

In this community, the vast majority of the patrons of the school system have voluntarily elected to have their children attend school with members of their own race. School authorities must take this fact into account in making provision for an adequate school population to assure efficient management of its schools. The zone lines reflected on the maps are flexible and every patron may have speedy recourse to the Board of Education for transfer of their child to another school without regard to race.

VI. The Board of Education, and its staff, acting under the Pupil Assignment Law have granted a number of transfers from one attendance zone to another upon application of its patrons.

VII. Defendants, who are charged with the responsibility of operating the vast Memphis School System, are fully cognizant of the decision of the United States Supreme Court in *Brown* v. *Board of Education* and the law announced in that case, that a state agency may not deny a child the right to attend the public school of his choice.

because of race or color; and said defendants clearly intend to cooperate to the end that the transition from the segregated school to the integrated school should be accomplished with dispatch and that the numerous problems incident to such a changeover be kept to a minimum. The Court and the defendant Board members are of the opinion that this transition should be accomplished more expeditiously and more satisfactorily through resort to the Tennessee Pupil Assignment Law of 1957, being Section 49-1741, et seq., Tennessee Code Annotated.

VIII. The defendants' intention to effect the integration of their school system under the Pupil Assignment Act has not been a secret but has been generally known to the public, including the plaintiffs in this case for quite some time; that the operation of the school system under the law has been made known by the Board of Education to the members of its staff and the principals of its schools; and that at a public meeting of the Board of Education held on February 6, 1960, each of the plaintiffs and their counsel were advised in clear and unequivocal terms that applications by its Negro patrons for the assignment or transfer of a Negro child to a school heretofore attended solely by white children would be duly considered and acted upon by the Board of Education under the Pupil Assignment Law without regard to the race or color of the applicant.

IX. That the Board of Education at said meeting of February 6, 1960, and on other public occasions, as well as in the sworn testimony of the members of said Board appearing in Court, has evidenced all good faith to this Court of its intention to comply with the decision of the United States Supreme Court and in all good faith to con-

sider applications for transfer without regard to race. The Court finds, therefore, that plaintiffs' fears that the law will be administered adversely to them are totally unfounded. The attitude of the plaintiffs toward the Pupil Assignment Law is based, not upon experience or upon what is shown to have occurred, but rather upon what plaintiffs seem to fear will occur. Such attitude is totally unfounded.

X. The Tennessee Pupil Assignment Law furnishes the plaintiffs an effective and adequate State remedy to effect the objectives which they seek in their Complaint.

XI. The plaintiffs admit that they have never exhausted the administrative remedies afforded them under said assignment law and, in fact, the Court finds that the plaintiffs, for reasons best known to them, have refused to even initiate the remedy afforded them by that law in spite of the public assurance to the plaintiffs by defendants of their good-faith application of said law.

XII. The application of Mrs. Marjorie McFerren for a transfer of her child was made in September, 1958; that in June, 1958, pursuant to the Pupil Assignment Law this pupil had been assigned to the Hyde Park School; that Mrs. McFerren desired that he attend the Vollentine School and upon presenting the child for registration at Vollentine, she was referred to the Board of Education; that such referral was the established procedure without regard to the race or color of the applicant; that before appearing at the Board of Education she registered her child at Hyde Park. She then appeared at the Board of Education and requested a transfer on the grounds of convenience as shown in the application, Exhibit 40. That said application

was rejected by the Superintendent and Mrs. McFerren was advised of her right of appeal to the Board of Education, as provided by the Pupil Assignment Law, and assured that all time limitations on her application for transfer would be waived pending a determination of the matter; and that though testifying that she did not know of this right of appeal, the Court finds that she had full knowledge of same but failed, refused and neglected to exhaust the administrative remedy afforded her.

XIII. Two Negro high school pupils testified that in September, 1960, they appeared at the Board of Education and requested a transfer from Melrose High School to South Side High School nearer to their home. The proof shows that it has long been the practice and policy of the Board of Education to consider pupil transfer applications only when the application is made by the parents; that utter confusion in the school system would result if pupils were permitted to request transfers from one school to another and the practice of the Board of Education to require transfer applications to be made by parents is a completely reasonable one. In line with the aforementioned policy of the Board of Education, the transfer applications of these two Negro high school pupils were never considered by the Board of Education or any member of its staff. The applications for transfer were not rejected on the basis of the race of the applicants.

XIV. In no instance has it been shown that the Board of Education of the Memphis City Schools has denied an application for transfer upon the basis of the race or color of the applicant upon proper application being made.

XV. The Tennessee Pupil Assignment Law was enacted by the General Assembly of the State of Tennessee several years prior to the filing of this suit. The Court judicially knows that the law was enacted in a background and with an attitude of compliance with the decision of the Supreme Court of the United States in *Brown* v. *Board of Education*, 349 U. S. 294, rather than in a background of opposition to said decision.

XVI. In the Court's judgment and as a matter of fact, the Tennessee Pupil Assignment Law furnishes as effective a plan for compliance with the decision of the Supreme Court of the United States as this Court could devise; provided, of course, that the law is administered in good faith. The defendants have assured the general public, including the plaintiffs, and have assured this Court during the trial that the law will be administered on a non-racial basis and in all good faith. It would be much better for the defendants to operate the school system within the framework of the state law rather than to have this Court find itself in the business of operating the Memphis schools.

XVII. To date, the plaintiffs have shown no inclination to comply with the plan of desegregation afforded them by the Tennessee Pupil Assignment Law. In order for this plan to work there must be not only compliance with that law but cooperation on the part of both the plaintiffs and the defendants. The plaintiffs share an equal obligation with the defendants in applying the provisions of that law and the doors of this Court will always be open to protect the constitutional rights of the plaintiffs if that law and the plan of desegregation provided therein are unconstitutionally applied.

XVIII. During argument the Court inquired of plaintiffs' counsel concerning the so-called grade-a-year plan of desegregation. Plaintiffs rejected this plan. The Court feels that the plan offered under the Tennessee Pupil Assignment Law permitting the transfer of any qualified pupil is much better than the grade-a-year plans so frequently discussed. The plan of the Tennessee Pupil Assignment Law is a sound and complete one and is fully adequate to insure a fair deal to all of the citizens of this community.

CONCLUSION OF LAW

I. The Court has jurisdiction of the parties and the subject matter of this cause.

Title 28, U.S.C.A. Sec. (1343) (3)
Title 42, U.S.C.A. Sec. 1983

II. The Supreme Court of the United States has declared that the state may not deny to any person on account of race the right to attend any school that it maintains.

Brown v. *Board of Education*, 347 U. S. 488, 74 Sup. Ct. 686, 98 L. Ed. 873

Brown v. *Board of Education*, 349 U. S. 294, 75 Sup. Ct. 753, 99 L. Ed. 653

Briggs v. *Elliot*, 133 Fed. Supp. 864, 865

Kelly v. *Nashville* (6 Cir.) 270 F. (2d) 209.

III. If the schools which the state maintains are open to children of all races, no violation of the constitution is involved even though the children of different races voluntarily attend different schools as they attend different

churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend.

Kelly v. *Nashville*, supra

Briggs v. *Elliot*, supra

IV. The Constitution does not require integration; it merely forbids discrimination. It does not forbid such segregation as follows as the result of a voluntary action; it merely forbids the use of governmental power to enforce segregation.

Kelly v. *Nashville*, supra

Briggs v. *Elliot*, supra

V. Each case of this type must be determined upon the basis of the facts and evidence adduced in each particular case.

Kelly v. *Nashville*, supra

VI. The Tennessee Pupil Assignment Law, being Sections 49-1741, et seq., Tennessee Code Annotated, furnishes to plaintiffs an effective and adequate remedy for the relief which they seek in their Complaint.

Shuttlesworth v. *Board of Education*, 162 F. S. 372, affirmed 358 U. S. 101; 3 L. Ed. (2d) 145; 79 Sup. Ct. 221;

Carson v. *Board of Education*, 227 F. (2d) 789;

Holt v. *Raleigh City Board*, 265 F. (2d) 95, cert. den. 361 U. S. 818, 4 L. Ed. (2d) 63; 80 Sup. Ct. 59.

VII. Plaintiffs are obligated to exhaust the administrative remedy afforded them before seeking judicial relief.

Carson v. *Board of Education*, supra;

Hood v. *Board of Trustees*, 232 F. (2d) 626, Cert. Den. 352 U. S. 870, 1 L. Ed. (2d) 76, 77 Sup. Ct. 95;
Carson v. *Warlick*, 238 F. (2d) 724;
Covington v. *Edwards*, 264 F. (2d) 780;
Holt v. *Raleigh City Board*, supra;
Dove v. *Parham*, 271 F. (2d) 132;
Cook v. *Davis*, 17[illegible] F. (2d) 595;
Thomas v. *Chamberlain* (1955, Tenn.) 143 F. S. 671, affirmed 236 F. (2d) 417 (6 Cir.)
Donaldson v. *U. S.* (6 Cir.) 264 F. (2d) 804.

.....
United States District Judge

Judgment

(Entered May 2, 1961)

The issues in the above-entitled action having been regularly brought on for trial before the Honorable Marion S. Boyd, District Judge, without a jury, the parties having appeared by their respective counsel and the issues having been duly tried; and the Court having filed its opinion on the fourteenth day of April, 1961, and its Findings of Fact and Conclusions of Law directing the entry of Judgment on the second day of May, 1961;

And it appearing to the Court that the plaintiffs' prayer for alternative relief directing the approval of a plan of desegregation should be sustained; and that the Tennessee Pupil Assignment Law furnishes a fully adequate and efficient plan of operating the Memphis City School System on a racially non-discriminatory basis;

IT IS ORDERED, ADJUDGED AND DECREED that the alternate prayer of the Complaint be sustained and the Tennessee Pupil Assignment Law be approved as the plan of desegregation for the Memphis City School System;

And it further appearing to the Court that defendants do not operate a compulsory bi-racial school system and that the plaintiffs have not exhausted the administrative remedies afforded them under the Tennessee Pupil Assignment Law.

IT IS ORDERED, ADJUDGED AND DECREED that the remaining prayers of the Complaint be denied.

The costs of the cause are assessed equally against the parties.

MARION S. BOYD
United States District Judge

Dated: 5-2-61

(Seal)

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEBORAH A. NORTHCROSS, ET AL.,
Plaintiffs-Appellants.

vs.

THE BOARD OF EDUCATION OF THE CITY OF MEMPHIS, *et al*,
Defendants-Appellees.

No. 14,642

MOTION TO DISMISS THE APPEAL

Come the defendants, Board of Education of the Memphis City Schools, the individual members of said Board, and its superintendent and respectfully move the Court for an order dismissing the appeal in the captioned matter, and in support of said motion, defendants would show:

I.

That as appears from the affidavit of William D. Galbreath, Esq., president of the Board of Education of the Memphis City Schools, said affidavit being attached hereto, the Memphis school system was desegregated on October 3, 1961, by members of the class for which relief was sought; that said desegregation was accomplished pursuant to the provisions of the Tennessee Pupil Assignment Law,

being Sections 49-1701, et seq., Tennessee Code Annotated, and under the plan of desegregation directed in the judgment of the District Court in this cause; that the relief sought by the plaintiffs in the Court below has been granted to them as the result of their application of the administrative remedy which the District Court suggested that they seek; and that the issues involved in this proceeding have become moot.

WHEREFORE, defendants respectfully move the Court that this appeal be dismissed.

II.

That in the alternative defendants respectfully move that the affidavit of William D. Galbreath, Esq., attached hereto in support of said motion to dismiss the appeal be considered as a part of the record in this cause pursuant to the authority vested in the Court by Rule 75-H of the Federal Rules of Civil Procedure.

/s/ Jack Petree
/s/ Larry B. Creson
Attorneys for Defendants-Appellees

EVANS, PETREE & COBB
LAUGHLIN, WATSON & CRESON,
Of Counsel

Certificate of Service

Copy of this Motion To Dismiss The Appeal served on A. W. Willis, Jr., Esq., R. B. Sugarmon, Jr., Esq., and Miss Constance Mobley, Attorneys for Plaintiffs, this the 14th day of December, 1961.

/s/ Jack Petree

STATE OF TENNESSEE
COUNTY OF SHELBY

AFFIDAVIT OF WILLIAM D. GALBREATH, PRESIDENT OF THE BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS

My name is William D. Galbreath. I am president of the Board of Education of the Memphis City Schools, having been elected to that office to succeed Walter P. Armstrong, Jr.

During my tenure as president of the Board of Education I have thoroughly familiarized myself with the matters involved in this litigation and the events occurring subsequent to the decision rendered by the United States District Court for the Western District of Tennessee.

Even prior to the District Court's decision and prior to my becoming president of the Board of Education I was aware of the fact that the Board had publicly announced that it intended to use the Tennessee Pupil Assignment Law as the plan of desegregating the Memphis school system and the several public assurances given by the Board that said Act would be applied on a racially nondiscriminatory basis. The various news media in the City of Memphis have described this as the "good faith plan" of the Board of Education.

On August 28, 1961, the first day of registration in the Memphis school system, forty-two Negro children made application to desegregate the public school system in Memphis. This was the first and only time that the admin-

istrative remedy had been initiated. The seeking of that remedy met with success. The procedures prescribed by the Tennessee Pupil Assignment Law were immediately put into effect by the Board of Education with the view of successfully desegregating the school system under the State law.

By virtue of the wholehearted cooperation of the Board of Education and its counsel, each locally elected governmental agency, such as the Mayor and Board of Commissioners of the City of Memphis, the Shelby County Quarterly Court, the Shelby County Board of Commissioners, all forms of local news media and the cooperation of the forty-two applicants and their counsel, said counsel being the local counsel for plaintiffs in this litigation, the schools of the City of Memphis were desegregated on October 3, 1961, when thirteen Negro children were admitted to three schools heretofore attended by white children.

The desegregation of this school system was accomplished in a spirit of good will and cooperation. It was accomplished without the opposition of political leaders. On the contrary, it was accomplished with their support and endorsement. It was accomplished without the intervention of Federal Agencies. On the contrary it was accomplished under the State law as a purely local matter affecting only the citizens of this community. It was accomplished without strife, turmoil or ill will. On the contrary it was accomplished in an air of peace and tranquility that has not been experienced in any Southern community. Finally, this event was accomplished without fanfare and in a fashion that was deemed best to reflect only good on the

community. In a word, it was accomplished in good faith with every member of the community recognizing the rights, duties, desires and obligations of all concerned.

Of the forty-two applicants initially seeking the remedy afforded them under the Assignment Law, four of them abandoned their applications and the Board of Education had for consideration thirty-eight applications. Of these thirty-eight applications more than one-third of them were approved. This action of the Board should be compared with the action of other systems that have recently faced this problem. Of those applicants who were rejected, not one has raised an objection to the Board's action and at this time, more than two months after the desegregation of the Memphis Schools, the Board of Education's plan has apparently been accepted by all of the citizens of this community.

/s/ William D. Galbreath

Personally appeared before me, a Notary Public in and for said County and State, William D. Galbreath who makes oath that he is president of the Board of Education of the Memphis City Schools and that the foregoing statement is true.

WITNESS my hand and seal this fourth day of December, 1961

/s/ Grace C. Canale
Notary Public

My commission expires:
July 7, 1965

No. 14642

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEBORAH A. NORTHCROSS, *et al*,
Defendants-Appellees,
vs.
THE BOARD OF EDUCATION OF THE CITY OF MEMPHIS, *et al*,
Plaintiffs-Appellants.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided March 23, 1962.

Before: CECIL, WEICK and O'SULLIVAN, Circuit Judges.

CECIL, Circuit Judge. This appeal involves the public school system of the City of Memphis, Tennessee.

The appellants were plaintiffs in the District Court for the Western District of Tennessee. They are eighteen minors and their parents, all of the Negro race, who bring the action on behalf of themselves and all other Negro children and their parents in Memphis, similarly situated. The defendants-appellees are the Board of Education of the City of Memphis, the members thereof individually, and the superintendent of schools. The parties will be referred to hereinafter as plaintiffs and defendants.

Jurisdiction of the District Court is invoked by virtue of section 1343(3), Title 28, U.S.C. By this act, jurisdiction is conferred "To redress the deprivation, under color of any State law, . . . custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . for equal rights of citizens or of all persons within the jurisdiction of the United States."

It is alleged in the complaint, inter alia, that the defendants maintain and operate a compulsory biracial school system in the City of Memphis, in which certain schools are designated for Negro students only and staffed by Negro personnel, and certain other schools are designated for white students only and staffed by white personnel. It is further alleged that there is separate geographical zoning for the Negro and white schools and that these zones in some instances overlap so that both Negro and white students are in the same zone. The plaintiffs also allege that they have not exhausted their remedies under the Tennessee Pupil Assignment Law for the reason that it does not provide an adequate remedy for the relief they seek.

By their complaint, briefly stated, the plaintiffs seek an order enjoining the defendants from operating a biracial school system or in the alternative for an order to the board to submit a plan for the reorganization of the schools on a unitary non-racial basis.

The defendants in their answer deny that they maintain a compulsory biracial school system in the city of Memphis. They admit that certain of their schools are attended and

staffed solely by members of the white race and that certain other schools are attended and staffed solely by members of the Negro race. They concede that there is no racial integration of their schools for the reason that no members of the Negro race have made applications for transfers to white schools. The defendants allege in their answer that the Tennessee Pupil Assignment Law affords to plaintiffs and defendants a simple and easy method of complying with the requirements of the Supreme Court of the United States in the school segregation cases.

A trial was had in the District Court upon the issues presented by the pleadings, after which the District Judge made findings of fact and conclusions of law and entered judgment on May 2, 1961.

The trial judge found as facts, that the defendants do not operate a compulsory biracial school system or maintain a dual schedule or pattern of school zone lines based upon race or color; that the school zone maps introduced in evidence have no significance as evidence of a biracial school system; that the Tennessee Pupil Assignment Law furnishes the plaintiffs an effective and adequate remedy for integration and as effective a plan for compliance with the decisions of the Supreme Court of the United States as the Court could devise; that the defendants' intention to effect integration of the school system under the Pupil Assignment Act has been open and generally known to the public and that the plaintiffs and their attorneys were so advised at a public meeting of the Board of Education on February 6, 1960; that the Board has evidenced all good faith to the public and to the court of its intention to comply with the decision of the Supreme Court.

By judgment entry the court sustained the plaintiffs' prayer for alternative relief by approving the Tennessee Pupil Assignment Law as a plan for desegregation and denied further relief to the plaintiffs for the reason that the defendants did not operate a biracial school system and the plaintiffs had not exhausted their administrative remedies under the Assignment Law.

On December 14, 1961, after this appeal was docketed, the defendants filed in this Court a motion to dismiss the appeal. The basis of the motion is that the Board desegregated the schools of Memphis on October 3, 1961, and that the issues involved in the appeal have now become moot. This motion is supported by an affidavit of the president of the Board of Education.

In this affidavit it is alleged that on August 28, 1961, forty-two Negro children made application to desegregate the public school system of Memphis; that four of them abandoned their applications and thirty-eight were considered by the Board; and of these applicants thirteen were admitted to three schools previously attended by white children.

This is denominated in the affidavit as desegregation of the Memphis schools and it is alleged that it was accomplished through the coorporation of members of the Negro race, the news media and public officials of Memphis. It is further alleged that it was accomplished without fanfare or strife, and that it has been generally accepted by all of the citizens of the community.

By filing this motion and affidavit, after the appeal was docketed, the defendants enlarged the record without an opportunity to the plaintiffs to be heard on the subject involved. The affidavits does not state what criteria was applied in granting these transfers, but we were informed in oral argument that they were based on scholarship by tests not given to white children in the same school.

At the time this action was brought, according to the evidence, there were in the city of Memphis approximately fifty-five white elementary school units, fifteen white junior high schools and nine white senior high schools. At the same time, there were approximately thirty-one Negro elementary school buildings, seven Negro junior high, and six Negro senior high units. There were separate technical high schools and separate schools for Negro and white crippled children. There are approximately 100,000 pupils in the Memphis school system, forty-four percent of whom are Negroes.

The Pupil Assignment Law was enacted by the Tennessee legislature in 1957. Sections 49-1701—49-1764 Tenn. Code. At the time this action was filed in March of 1960, no Negro pupil had ever been transferred to a white school, nor had a white pupil ever been transferred to a Negro school, under the operation of the law. The superintendent of schools testified that the Assignment Law is not applied to children entering school for the first time. In the case of such children, the principal to whom application is made will take into consideration the applicant's race and residence in determining an assignment to a school. The evidence also shows that there are dual area

zone maps, one for white schools and one for Negro schools. These zones may overlap and there may be Negro and white children in the same zone, but each goes to the school for his respective race.

One of the plaintiffs, Mrs. McFerrin, applied in 1958 for admission of her son to Vollentine, a white school. Mrs. McFerrin and her son lived in an area assigned to Hyde Park, a Negro school. The Vollentine school is located four blocks from the home and on the same side of the street. Hyde Park is ten blocks from their home and reached by an indirect route. She asked for the transfer for convenience, but the superintendent denied her application for the reason that transfers were not granted for convenience.

In 1960 two Negro girls who were enrolled in Melrose High School, (Negro), sought a transfer to South Side High School, (white). They had moved within four blocks of the South Side School. They were told that they were in the Booker T. Washington (Negro) district and were offered transfers to that school. It required a thirty-to forty-five minute bus ride to get to Melrose, and Washington was almost equally far away, and they refused the transfer.

In May 1954, the Supreme Court of the United States decided that "Separate educational facilities are inherently unequal," and that segregation of the races in separate schools deprived the minority group of the equal protection of the laws guaranteed by the Fourteenth Amendment. *Brown v. Board of Education*, 347 U. S. 483. At this

time, the Constitution of Tennessee provided that white and Negro children were not to be received as scholars together in the same school. Art. 11, Sec. 12, Tenn. Const. The statutes of Tennessee also prohibited white and Negro children attending the same schools. Sections 49-1005 49-1107, and 49-3701 Tenn. Code.

It is conceded that these provisions of the Constitution and statutes were no longer enforcible after the *Brown* decision. The defendants now claim that compulsory segregation of the races for school purposes has been abandoned in the city of Memphis, and that the Board of Education has adopted a plan for full compliance with the second *Brown* decision, 349 U.S. 294, for the admission of Negroes to its public schools on a racially non-discriminatory basis.

The questions presented are whether the schools of Memphis are being operated on a racially non-discriminatory basis and whether the Pupil Assignment Law can in and of itself constitute a plan for such operation.

This law declares that the public schools shall be free to all persons above the age of six; provides that the board of education of each city shall enroll and assign all pupils to schools and subject to review or certain exceptions this exercise of power by the board is final; that certain criteria or factors, some twenty in number, may be considered in making assignments; that each school child shall be assigned to the same school he attended prior to January 25, 1957, until graduation therefrom; that the board may prescribe a date for filing applications for admission or transfer and refuse to consider applications filed after such

date; and that the board may conduct investigations, surveys, and give tests in determining the schools to which pupils shall be assigned.

There is a further provision that if there is dissatisfaction with the assignment of a child, both parents may make application for a hearing before the board and a transfer to another school. The board shall consider each case separately and its decision shall be based on the criteria heretofore mentioned. From an unfavorable decision of the board, both parents may petition the chancery court of the county where the board of education is located for review. The review is based on a transcript of the proceedings before the board. The findings of the board shall be final if supported by substantial evidence on the entire record. The court has no power to suspend an order of the board until after final determination, except after a preliminary hearing and upon a prima facie showing by the petitioner that the board has acted arbitrarily, fraudulently or unlawfully, to the manifest detriment of the child. A further appeal may be taken to the court of appeals or the Supreme Court by both parents or the board of education.

The Pupil Assignment Law might serve some purpose in the administration of a school system but it will not serve as a plan to convert a biracial system into a nonracial one.

In *Kelly v. Board of Education of City of Nashville*, 159 F. Supp. 272, 276, D.C. M.D. Tenn., it was held that the administrative remedy under the act was inadequate to

end racial discrimination in the public school system of Nashville, Tennessee.

In *Gibson v. Board of Public Instruction of Dade County, Florida*, 272 F. 2d 763, 766, C.A. 5, the court said: "That being true, we cannot agree with the district court that the Pupil Assignment Law, or even that the Pupil Assignment Law plus the Implementing Resolution, in and of themselves, met the requirements of a plan of desegregation of the schools or constituted a 'reasonable start toward full compliance' with the Supreme Court's May 17, 1954, ruling. That law and resolution do no more than furnish the legal machinery under which compliance may be started and effectuated. Indeed, there is nothing in either the Pupil Assignment Law or the Implementing Resolution clearly inconsistent with a continuing policy of compulsory racial segregation."

And in *Gibson v. Board of Public Instruction of Dade County, Florida, et al.*, 246 F. 2d 913, 914, C.A. 5, the court said, at p. 914: "Neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial segregation in the public schools. So long as that requirement continues throughout the public school system of Dade County, it would be premature to consider the effect of the Florida laws as to the assignment of pupils to particular schools." See also, *Mannings v. Board of Public Instruction of Hillsborough County, Florida*, 277 F. 2d 370, C.A. 5.

In *Parham & Dove*, 271 F. 2d 132, C.A. 8, the court required three Negroes, individually, who sought transfers

to white schools to exhaust their administrative remedies. However, the court said, at p. 137: "In this field of constitutional paramountcy, *a placement or assignment statute is entitled to be accorded recognition only as an implement or adjunctive element on the part of a state for effecting or orderly solution to its desegregation difficulties*, in proper relationship to its other school-system problems, but with a subservience to the supreme-law declaration of the *Brown* cases as to all imposed segregation and the obligation owed to get rid thereof within the tolerance entitled to be allowed play under these decisions for accomplishing that result." (Emphasis added.)

This position was reaffirmed in *Dove v. Parham*, 282 F. 2d 256, 261, C.A. 8, where the court held that assignment and placement laws were "subordinate to the duty to move forward, by whatever means necessary, to correct the existing constitutional violation with "all deliberate speed.'"

Opinions of the Fourth Circuit have been cited in support of the defendants' position. [1]We consider them, as did the Fifth Circuit. "Obviously, unless some legally nonsegregated schools are provided, there can be no constitutional assignment of a pupil to a particular school. We do not understand that the Fourth Circuit has ruled to the contrary. The net effects of its rulings, as we understand

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[1]*Hood v. Board of Trustees of Sumter County School District No. 2*, Sumpter County, South Carolina, 286 F. 2d 236, C.A. 4; *McCoy v. Greensboro City Board of Education*, 283 F. 2d 667, C.A. 4; *Holt v. Raleigh City Board of Education*, 265 F. 2d 95, C. A. 4, cert. denied, 361 U.S. 818; *Hood v. Board of Trustees of Sumter County School District No. 2*, Sumter County, South Carolina, 232 F. 2d 626, C.A. 4, cert. denied, 352 U.S. 870; *Carson v. Board of Education of McDowell County*, 227 F. 2d 789, C.A. 4.

them, is that the desegregation of the public schools may occur simultaneously with and be accomplished by the good faith application of the law providing for the assignment of pupils to particular schools. If that understanding is correct, then we readily agree." *Gibson v. Board of Public Instruction of Dade County, Florida*, 272 F. 2d 763, 767, C.A. 5.

More than seven years had elapsed from the time of the first *Brown* decision to the time of the trial and judgment of this case in the District Court. More than four years had passed from the time of the enactment of the Assignment Law, and yet at that time the schools of Memphis were as biracial as they had been under the Tennessee Constitution and statutes.

The defendants admit in their brief that the Memphis school system was in fact a biracial one. They say, however that this does not result from compulsion on their part. It is voluntary on the part of the Negro pupils and parents because they do not avail themselves of the transfer provisions of the law.

It was decided in the first *Brown* case that the separation of children of similar age and qualifications solely because of race was a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Since that decision, there cannot be "Negro" schools and "white" schools. There can now be only schools, requirements for admission to which must be on an equal basis without regard to race.

Minimal requirements for non-racial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right. "Obviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated and cannot be tolerated." *Jones v. School Board of City of Alexander, Virginia*, 278 F. 2d 72, 76, C.A. 4.

The Pupil Assignment Law assigned, by legislative enactment, all children who had previously been enrolled in the schools to the same schools that they had attended under the constitutional and statutory separate racial system. They were to remain in these same schools until graduation unless transferred by a request of both parents. At the end of the school year of graduation, from an elementary or junior high, they were assigned to a school for the next year. As a matter of practice, Negroes were assigned to so-called "Negro" schools. Although it is claimed that beginning pupils could apply to any school, the practice was for the Negro children to be assigned to "Negro" schools.

It is argued that the transfer provisions of the law create a voluntary system and that, by reason of them, there is no compulsory segregation of races. These transfer provisions do not make of this law a vehicle to reorganize the schools on a non-racial basis. Nor has the practice for four years under the law been in the direction of establishing non-racial schools. Negro children cannot be required to apply for that to which they are en-

titled as a matter of right. If they are deprived of their Constitutional rights, they are not required to seek redress from an administrative body before applying to the courts. *Borders v. Rippy*, 247 F. 2d 268, C.A. 5. The burden rests with the school authorities to initiate desegregation. *Cooper v. Aaron*, 358 U.S. 1, 7.

Any pupil through both parents may request a transfer but in the final analysis it is up to the school board to grant or reject it. Although an appeal may be taken to the courts, it would be an expensive and long drawn out procedure, with little freedom of action on the part of the courts. In determining requests for transfers, the board may apply the criteria heretofore mentioned. None of these criteria is based on race, but in the application of them, one or more could always be found which could be applied to a Negro. The denial of the transfers herein referred to is significant of the practical application of the transfer provisions of the law.

The trial judge found that the defendants do not operate a compulsory biracial school system. It might be said that by reason of the transfer aspect of the law, it is not compulsory. The real question is, Do they maintain separate schools? The first *Brown* case decided that *separate schools organized on a racial basis are contrary to the Constitution of the United States.*

The inescapable conclusion is that at the time of the judgment in this case the schools of Memphis were operated on a basis of "white schools" for white children and "Negro schools" for Negroes. The findings of fact that

the school zone maps introduced in evidence have no significance as evidence of a biracial school system, and that the defendants do not maintain a dual schedule or pattern of school zone lines, based upon race or color, are contrary to the evidence and clearly erroneous. As we have previously said, the Pupil Assignment Law cannot serve as a plan to organize the schools as a non-racial system.

We do not discuss exhaustion of remedies under the statute for the reason that we hold the Pupil Assignment Law is not adequate as a plan for reorganizing the schools into a non-racial system. *Kelly v. Board of Education of City of Nashville*, 159 F. Supp. 272, 277, D.C. M.D. Tenn; *Gibson v. Board of Public Instruction of Dade County, Florida*, 246 F. 2d 913, C.A. 5.

The motion to dismiss the appeal must be and it is hereby overruled. The admission of thirteen Negro pupils, after a scholastic test, which the white children did not have to take, out of thirty-eight who made application for transfer, is not desegregation, nor is it the institution of a plan for a non-racial organization of the Memphis school system.

We are impressed that the defendants honestly and sincerely desire to comply with the law, but they have pursued the mistaken belief that "full compliance" as required by the Supreme Court can be had under the Pupil Assignment Law. The practice over a long period of time of separate schools in certain geographical areas of our nation has become a way of life in those areas, and we realize that a change is not easy to accomplish. But as

this Court must follow the supreme law of the land, as interpreted by the Supreme Court: so must boards of education follow it. *Cooper v. Aaron*, 358 U.S. 1. We urge the defendants herein to adopt and submit to the District Court some realistic plan for the organization of their schools on a non-racial basis, in "full compliance" with the mandate of the Supreme Court, and to do so "with all deliberate speed."

The judgment of the District Court is reversed with instructions to restrain the defendants from operating a biracial school system in Memphis, or in the alternative to adopt a plan looking toward the reorganization of the schools, in accordance with the Constitution of the United States. The District Court should retain jurisdiction of the case during the period of transition. *Brown v. Board of Education*, 349 U.S. 294, 301.

No. 14642

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Defendants-Appellees. DEBORAH A. NORTHCROSS, *et al*, *Plaintiffs-Appellants,* vs. THE BOARD OF EDUCATION OF THE CITY OF MEMPHIS, *et al*,	ON PETITION for Rehearing.

Decided April 26, 1962.

Before: Cecil, Weick and O'Sullivan, Circuit Judges.

Per Curiam: This cause is before the Court on petition for rehearing.

One point raised by the petition is that the Court made an erroneous statement in its opinion, to the effect that Negro children were given scholastic tests not given to white children, in order to be admitted to "white" schools, under the Tennessee Pupil Assignment Law.

This matter arose out of a motion of the appellees to dismiss the appeal supported by an affidavit. In this affidavit it was alleged that the schools of Memphis were desegregated by the admission of thirteen Negro students

to "white" schools. The affidavit did not specify what criteria were applied in order to allow these admissions.

This motion and affidavit tended to change the character of and add to the issues presented on the appeal without an adequate opportunity for a hearing. There was no denial that thirteen students had been thus transferred and there was nothing in the affidavit to be traversed by counter-affidavit. This Court cannot accept the conclusion of the appellees that these transfers under the Tennessee Pupil Assignment Law constituted desegregation.

Upon inquiry in oral argument, the Court understood that scholastic tests were given to the Negro students and not to the white students of the same schools. The necessity for this inquiry arose by reason of the interjection of the motion into the record, as heretofore stated.

The Court does not wish to make an incorrect statement of fact and will amend its opinion, in respect to the claimed error, if it is shown to be an error. For this purpose, the Court will permit the parties to submit affidavits upon the sole question of how scholastic tests were applied and to whom, in connection with the transfers.

The Court in its opinion concluded that the Pupil Assignment Law, while not unconstitutional on its face and while it may serve some function in proper school administration, it cannot serve as a vehicle for desegregation. Other points raised by the petition for rehearing have been previously considered and found to be without merit.

The petition for rehearing will be denied.

No. 14642

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEBORAH A. NORTHCROSS, *et al*,
Plaintiffs-Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF MEMPHIS, *et al*,

NO. 14,642

AFFIDAVIT

STATE OF TENNESSEE)
COUNTY OF SHELBY)

R. B. SUGARMON, JR., who after being duly sworn according to the law, deposes and says:

That he is over twenty-one (21) years of age, a resident citizen of Memphis, Shelby County, Tennessee, and an attorney duly licensed to practice law in the State of Tennessee; and

That he is one of the attorneys of record in Cause No. 14,642, Deborah A. Northcross, et al, Plaintiffs-Appellants, vs. The Board of Education of the City of Memphis, et al, Defendants-Appellees, now pending in the United States Court of Appeals for the Sixth Circuit; and

Affidavit of R. B. Sugarmon

That this affidavit is being made for the purpose of revealing what information he has concerning the question of, "How and to whom scholastic tests were applied in connection with the Defendants-Appellees' motion for rehearing" and in accordance with the opinion of the Court of April 26, 1962, when said petition for rehearing was before said Court; and

That he, along with A. W. Willis, Jr., represented, as attorneys, parents of forty-two (42) Negro children in their effort to secure transfers from schools attended solely by members of their race to schools attended solely by white children, all of said children involved being first graders; and

That as counsels for said parents, they observed certain tests being administered, Binet I.Q Tests and Reading and Readiness Tests; and

That, on several occasions, they carried some of the children to the respective testing rooms, however, neither counsels or parents were permitted to enter the testing rooms during the time tests were being given; and

That, on one occasion, counsels recall seeing one or two white children enter the testing room during the time when Reading and Readiness Tests were to be administered to ten or twelve Negro children; and

That it was the understanding of the counsels that the white children were also first graders making applications to be transferred from one school solely attended by white

children to another school solely attended by white children; and

That counsels also learned from observation that the Reading and Readiness Tests are routine tests given to all first graders after they have been in school for approximately three or four weeks; and

That it is his understanding that the Reading and Readiness Tests are given in order to give the respective teachers some guide as to the readiness of his or her respective students; and

That the procedure that lead to admission of thirteen (13) Negro children to schools previously attended solely by white children was in substance as follows:

That Supt. E. C. Stimbert, in a television speech shortly before registration was scheduled, stated that parents of first graders were to take their first graders to a school of their choice; and

That the next day, the newspapers also reported this portion of Supt. Stimbert's speech indicating that parents were to take their first graders to the school of their choice; and

That on the day of registration, some seventy-five (75) Negro children appeared at schools previously attended solely by white children; and

That these children were directed to the Attendance Officer of the Board of Education; and that at some

of the schools applications for enrollment were filled out and forwarded to the Attendance Office of the Board of Education; and

That a few days later, all of the forty-two (42) Negro parents whom we represented received copies of notices assigning their children to schools attended solely by Negro children together with copies of transfer procedures; and

That upon advice of their counsels, the Negro children then attended the schools where they were assigned; and

That in the meantime, counsels then prepared applications for transfer and requested hearings; and

That counsels were advised by the Board of Education, pursuant to the pupil placement law, that they wished to administer Reading and Readiness and I.Q Tests unto the children we represented and also that the Board of Education wished to make family background studies that involved the sending of social workers to the homes of the children; and

That as counsels for parents of the Negro children, he and A. W. Willis, Jr., assisted in arranging schedules for tests and visits to the homes of the children by the social workers; and

That the first day of registration was August 28, 1961, and

That the Negro children attended school along with other children beginning August 31, 1961 at the schools solely attended by Negro children where they had been assigned and remained in said schools until October 3, 1961, when thirteen (13) of the forty-two (42) Negro children were transferred to schools previously attended solely by white children; and

That the remaining requests for transfer were denied and the children whom they represented continued to attend the schools where they were originally assigned; and.

That as far as he knows, tests were given only to children who had requested transfers and he has no way of knowing whether tests were given to other first graders for the purpose of admission other than those requesting transfers; and

That the counsels were informed at the hearing by the testing officer that the Binet I-Q Tests were not given to any children except in special cases having nothing to do with placement or assignment of the children initially; and

That the counsels were further informed by the testing officer that the Reading and Readiness Tests were given as a routine matter several weeks after assignment has been made and after expiration of the period of time in which requests for transfers can be made.

.....

Affiant.

SWORN AND SUBSCRIBED TO before me this the 30th day of April, 1962.

.....

Notary Public.

MY COMMISSION EXPIRES:

.....

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of April, 1962, I served a copy of the foregoing affidavit on Jack Petree, Esq., Evans, Petree & Cobb, Commerce Title Building, Memphis, Tennessee, and Larry B. Creson, Esq., Laughlin, Watson & Creson, Exchange Building, Memphis, Tennessee, by mailing one (1) true copy of same to each of them at addresses shown herein.

.....

Attorney for Plaintiff-Appellee

DATED: April 30, 1962

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Defendants-Appellees,		
DEBORAH A. NORTHCROSS, *et al,*		
Plaintiffs-Appellants,		NO. 14,642
vs.		
THE BOARD OF EDUCATION OF THE CITY OF MEMPHIS, *et al,*		
Defendants-Appellees.		

AFFIDAVIT

STATE OF TENNESSEE
COUNTY OF SHELBY

The affiant, William D. Galbreath, is President of the Board of Education of the Memphis City Schools and served in such capacity during August, September and October, 1961, when the Memphis City Schools were desegregated under the Tennessee Pupil Assignment Law; that affiant had full knowledge of the proceedings of the Board of Education, its staff and its counsel, during the desegregation hearings; that parents of forty-six (46) first grade children made application to transfer to a school other than that to which said children had been assigned; and that thirty-eight (38) of these first grade applicants were Negro pupils seeking transfer to a school theretofore attended by white students, four of the applications were for white pupils seeking transfer to a school theretofore attended by white pupils and four of the applications were abandoned.

Affidavit of William D. Galbreath

Affiant further states that the Tennessee Pupil Assignment Law was applied without discrimination to both the white and Negro pupils; that identical tests were administered to them in racially desegregated testing rooms; that achievement or intelligence tests were administered to all first grade applicants for transfer because the students were entering the system for the first time and the Board of Education had no records reflecting this information with respect to these students; that achievement or intelligence tests were not administered to the numerous applicants for transfer in grades two (2) through twelve (12) for the reason that said upper grade applicants had been tested in previous years and their records were complete in that respect; and that hearings were likewise conducted under the Tennessee Pupil Assignment Law for the upper grade transfer applicants.

Finally, affiant states that the transfer applications of thirteen (13) of the thirty-eight first grade Negro pupils were granted; that all four (4) of the applications by white pupils were denied; and that affiant reiterates the Board of Education's position that the tests and proceedings conducted with reference to all first grade transfer applicants were applied and held on a racially non-discriminatory basis.

Respectfully submitted,
/s/ William D. Galbreath

Personally appeared before me, a Notary Public in and for said County and State, WILLIAM D. GALBREATH, who makes oath that he is president of the Board of Education of the Memphis City Schools and that the foregoing statement is true.

WITNESS my hand and seal this 7th day of May, 1962.

/s/ Jack Petree
Notary Public

My commission expires:
July 7, 1965

Certificate of Service

Copy of the foregoing Affidavit served on A. W. Willis, Jr. Esq., R. B. Sugarmon, Jr., Esq. and Miss Constance Mobley, Attorneys for Plaintiffs-Appellants, this 7th day of May, 1962

/s/ Jack Petree

No. 14642

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEBORAH A. NORTHCROSS, ET AL.,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF MEMPHIS, ET AL.,
Defendants-Appellees.

ORDER

Before: CECIL, WEICK and O'SULLIVAN, Circuit Judges.

It is hereby ordered that the opinion in this case, dated March 23, 1962, be amended by striking the words "which the white children did not have to take" from the second full paragraph, on page 10.

/s/ Lester L. Cecil
Circuit Judge

Tennessee Pupil Assignment Law

49-1741. **Assignment of pupils by board of education.**—The board of education of each county, city and special school district, with respect to the schools under its jurisdiction, is authorized and required to provide for the enrolment in a public school of each child who is eligible for enrolment within the schools of said county, city or special school district. Except as otherwise provided by §§ 49-1741—49-1763, the authority of each and every local school board in the matter of enrolment of pupils within its county, city or special school district shall be full and complete and its decision as to the enrolment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such county, city or special school district other than the public school to which such pupil may be assigned pursuant to the rules, regulations and decisions of said board of education. Subject to review as provided in §§ 49-1748—49-1763, the board of education may exercise the powers and duties granted by §§ 49-1741—49-1763 directly or may delegate its authority to other persons employed by the board under such rules and regulations as the board may adopt, subject to final decision and action by the board itself. [Acts 1957, ch. 13, § 1.]

49-1742. *Factors considered in determining assignment of pupils.*—In determining the particular public school to which pupils shall be assigned, the board of education may consider and base its decision on any one or more of the following factors: available room and teaching capacity in the various schools; the geographical location of the place of residence of the pupil as related to the various schools of the system; the availability of transportation

facilities; the effect of the enrolment on the welfare and best interests of such pupil and all other pupils in said school as well as the effect on the efficiency of the operation of said school; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and cirriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualifications of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic program of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the effect of any disparity between the physical and mental ages of any pupil to be enrolled, especially when contrasted with the average physical and mental ages of the group with which the pupil may be placed; the sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the sex, morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor; together with any and all other factors

which the board may consider pertinent, relevant or material in their effect upon the welfare and best interest of the applicant, other pupils of the county, city or special school district as a whole and the inhabitants of the county, city or special school district. [Acts 1957, ch. 13, § 2.]

49-1743. **Continued attendance until graduation.**—Each school child who has prior to January 25, 1957 attended a public school and who has not moved from the county, city or special school district in which he resided while attending such school shall attend the same school which he has attended until graduation therefrom unless enrolled in a different school by the local board of education pursuant to the provisions of §§ 49-1741—49-1763. [Acts 1957, ch. 13, § 3.]

49-1744. *Rules and regulations.*—In the exercise of the authority conferred by §§ 49-1741—49-1763, the boards of education may prescribe general rules governing admission to schools within their jurisdiction, subject to the provisions of §§ 49-1741—49-1763, and may adopt such other reasonable rules and regulations as in the opinion of the board shall best accomplish the purposes of such section. [Acts 1957, ch. 13, § 4.]

49-1745. *Time for filing applications for admission or transfer.*—The board is authorized to prescribe a date reasonably in advance of the opening of school for the filing of applications for admission or transfer and to refuse to consider applications filed after such date for the ensuing school year. [Acts 1957, ch. 13, § 5.]

49-1746. *Investigation and surveys—Advisory committees—Tests.*— In determining and applying the general rules for the admission of children to the public schools, the board through its officers and employees may make investigations, conduct surveys and create and appoint advisory committees and study groups to assist in surveys and plans with respect to the enrolment of children within its jurisdiction, and may conduct such tests as it may consider advisable in determining the schools to which pupils shall be assigned or the grades, classes or courses of study within a school to which pupils should be assigned or enrolled. [Acts 1957, ch. 13, § 6.]

49-1747. *Notice of assignment.*—In assigning students, the board of education may give individual written notice of assignment on each pupil's report card or by written notice by any other feasible means to the parent, or may give notice by publication. [Acts 1957, ch. 13, § 7.]

49-1748. *Dissatisfaction with assignment—Application for hearing on transfer.*—Both parents, if living, or the parent, guardian or legal custodian of any child so assigned who is dissatisfied with the assignment of such child may, within ten (10) days of the order making said assignment, make written application to the board for a hearing before the board as to the reasonableness of said assignment and asking for a transfer to another school. Said application for transfer shall state the specific reasons why the applicant contends that the child should not attend the school assigned and the specific reasons why the child should be assigned to the different school named in the application. Upon the receipt of such application

for hearing, the board shall set a date for the hearing of the protest and such hearing shall be held within a reasonable time after receipt of the written application for the hearing. Written notice of the date and place of the hearing shall be given by the board or its secretary to the parents, guardian or legal custodian of such child by mailing a notice of hearing to said party at his last known mailing address at least ten (10) days before the date of the hearing. The applicant shall be entitled to appear in his own behalf or to be represented by counsel upon the hearing of such protest. [Acts 1957, ch. 13, § 8.]

49-1749. *Decision of board on protest—Writte norder.*—The board shall consider and decide each individual case separately on its merits; and its decision shall be based upon a consideration of the factors set forth in § 49-1742. Within a reasonable time after the completion of the hearing, the board shall enter a written order either granting or denying the protest. A copy of the order and the findings of the board shall be mailed by the board or its secretary to all parties appearing at the hearing at their last known mailing address within five (5) days from the date of such order. [Acts 1957, ch. 13. § 9.]

49-1750. *Evidence at hearings.*—In conducting such hearings as provided in §§ 49-1741—49-1763, the board shall not be bound by the rules of evidence applicable in a court, but it may admit and give probative effect to any evidence which possesses such probative value as would entitle it to be accepted by reasonable prudent men in the conduct of their affairs; provided, however, that the board shall give effect to the rules of privilege recognized by law; and provided further that the board may exclude in-

competent, irrelevant, immaterial or unduly repetitious evidence. All evidence including records and documents in the possession of the board of which it desires to avail itself, shall be offered and made a part of the record in the cause. No factual information or evidence other than that contained in the record shall be considered in the determination of the cause. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference. Each party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence. The board may take notice of judicially cognizable facts. In addition to the oral testimony of witnesses appearing at the hearing, the testimony of witnesses may be taken by deposition or upon interrogatories. [Acts 1957, ch. 13, § 10.]

49-1751. *Administration of oaths—Subpoenas—Compelling obedience—Witnesses' fees.*—In conducting hearings under §§ 49-1741—49-1763, the board shall have the power to administer oaths and affirmations and the power to issue subpoenas in the name of the state of Tennessee to compel the attendance of witnesses and the production of documentary evidence. All such subpoenas shall be served by the sheriff or any deputy of the county to which the same is directed; and such sheriff or deputy shall be entitled to the same fees for serving such subpoenas as in the case of the service of subpoenas from a court of record of the state. In the event any person fails or refuses to obey a subpoena issued hereunder, any court of record of this state within the jurisdiction of which the hearing is held or within the jurisdiction of which said person is found or resides, upon application by the board or its representatives, shall have the jurisdiction to at-

tach the body of such person and compel him to appear before the board and to give testimony or produce evidence as ordered; and any failure to obey such an order of the court may be punished by the court issuing the same as a contempt thereof.

Witnesses shall be entitled to the same fees as provided by law for witnesses in courts of record, which fees shall be paid as a part of the costs of the proceeding. [Acts 1957, ch. 13, § 11.]

49-1752. *Board may employ counsel—Evidence and cross-examination by board members.*—In conducting hearings under §§ 49-1741—49-1763 the board may employ counsel as provided in § 49-1762 to appear at and participate in such hearings behalf of the board. The board or its counsel may introduce evidence in support of the actions of the board. Members of the board may cross-examine any witness testifying at such hearings. [Acts 1957, ch. 13, § 12.]

49-1753. *Burden of proof.*—The burden of proof in all proceedings under §§ 49-1741—49-1763 shall be upon the person challenging the action of the board. [Acts 1957, ch. 13, § 13.]

49-1754. *Hearing conducted by examiners.*—The board of education is authorized to designate one or more of its members or one or more competent examiners to conduct any such hearings, and to take testimony, and to make a report of the hearings to the entire board for its determination. Before the board shall enter a final order in such cases the members thereof shall personally consider

the entire record and the board shall make its decision on the basis thereof. [Acts 1957, ch, 13, § 14.]

49-1755. *Petition for judicial review.*—Both parents, if living, or the parent, guardian or legal custodian of a child so assigned by final order of the board, may, at any time within thirty (30) days from the date of the final order, obtain a judicial review of the order by filing a petition for review in the chancery court of the county where said board of education is located. The petition shall state briefly the issues involved in the cause, the substance of the order of the board, and the respects in which the petitioner claims the order of the board is erroneous, and pray for an accordant review. The petition shall be addressed to the presiding chancellor and shall name the board of education as defendant. The petitioner shall file with his petition a copy of the decision of the board of education and a transcript of the proceedings and evidence before the board, authenticated by the person presiding over the hearing. In the event a copy of the transcript is not available within the period provided herein for the filing of such petitions, the court may, upon application of the petitioner within the time prescribed herein, grant an extension of the time within which said petition may be filed.

The petitioner shall give bond for costs as in other chancery suits or oath of paupers in lieu thereof.

Upon the filing of such petition the clerk and master shall immediately send by registered or certified mail to the chairman of the board, a notice of the filing of said petition and a certified copy thereof. In lieu of notice by

registered or certified mail, subpoena to answer may be personally served on each defendant as in other chancery cases. [Acts 1957, ch. 13, § 15.]

49-1756. *Effect of petition for review.*—The filing of such a petition for review shall not suspend or supersede an order of the board; nor shall the court have any power or jurisdiction to suspend or supersede an order of the board issued under §§ 49-1741—49-1763 prior to the entry of a final decree in the proceeding, except that the court may suspend such an order upon application by the petitioner made at the time of the filing of the petition for review, after a preliminary hearing, and upon a prima facie showing by the petitioner that the board has acted arbitrarily, fraudulently or unlawfully to the manifest detriment of the child who is the subject of the proceeding. [Acts 1957, ch. 13, § 16.]

49-1757. *Time for making defense—Hearing before court—Evidence.*—The defendants named in said petition shall make defense as in other chancery cases within thirty (30) days from the date of the filing of said petition, unless the time be extended by the court. Amendments may be granted as in other chancery proceedings. The cause shall stand for trial and shall be heard and determined at the earliest practicable date and shall be heard exclusively upon the proof introduced before the board contained in the transcript. No person shall be authorized to offer or introduce new or additional evidence before the court, except that in cases of alleged irregularities in procedure before the board, not shown in the record, testimony thereon may be taken before the court; provided, however, that if, before the date set for the hear-

ing, application is made to the court for leave to present additional evidence going to the merits of the cause, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the board, the court may order that the additional evidence be taken before the board upon such conditions as the court deems proper. Upon hearing such additional evidence, the board may modify its findings and decisions by reason thereof and shall file with the court, to become a part of the record, the additional evidence together with any modifications or new findings or decisions. [Acts 1957, ch. 13, § 17.]

49-1758. *Decision of chancery court.*—Upon the hearing, the court may dismiss the petition or vacate the order complained of in whole or in part; but, in case the order of the board is wholly or partly vacated, the court may, at its discretion, remand the case to the board of education for further proceedings not inconsistent with the decree of the court. The findings of fact of the board of education shall be considered final, if supported by substantial evidence on the entire record. The review of the chancery court as herein provided for shall not extend further than to determine whether the board of education has acted illegally, fraudulently or in excess of its jurisdiction, including a determination of whether the order of the board under review violated any right of the aggrieved party under the Constitution of the United States or the Constitution of Tennessee.

The chancellor shall reduce his findings of fact and conclusions of law to writing and make them a part of the record. [Acts 1957, ch. 13, § 18.]

49-1759. *Appeal from chancery court.*—From the final decree of the chancery court, an appeal may be taken by both parents, if living, or by the parent, guardian or legal custodian of the child in question, or by the board of education to the Court of Appeals or Supreme Court in the same manner and under the same rules as other appeals are taken from final decrees in chancery cases. [Acts 1957, ch. 13, § 19.]

49-1760. *Procedure in chancery cases.*—The rules of pleading, practice and procedure ordinarily followed in chancery cases will be followed in the review of orders of boards of education hereunder, except as otherwise provided in §§ 49-1741—49-1763. [Acts 1957, ch. 13, § 20.]

49-1761. *Parties to proceedings—Each case considered individually.*—Actions for the review of the decisions of the board of education in assigning a child to a school shall be filed and maintained only by both parents, if living, or by the parent, guardian or legal custodian of the child so assigned. The court shall consider and decide each individual case separately on its merits. The assignment of each child shall be considered to be an individual case, and no class actions shall be maintained. [Acts 1957, ch. 13, § 21.]

49-1762. *Employment of counsel, court reporters and other personnel—Expenses.*—Each board of education shall be authorized to employ counsel to represent the board in any matters arising under §§ 49-1741—49-1763, to employ court reporters for the purpose of preserving evidence at hearings conducted under §§ 49-1741—49-1763 and preparing transcripts thereof, and to employ such other

personnel and incur such other expenses as the board may find to be necessary for the efficient administration of §§ 49-1741—49-1763. Any judgments, liabilities and court costs adjudged against the board of education or the members thereof, the fees of attorneys employed by the board, and any and all other expenses and liabilities incurred under §§ 49-1741—49-1763, shall be the obligation of the county, city or special school district involved, and shall be paid from the funds of such county, city or special school district. [Acts 1957, ch. 13, § 22.]

49-1763. *Board members and agents immune from liability.*—No board of education or member thereof, nor its agents or examiners, shall be answerable to a charge of libel, slander or other action, whether civil or criminal, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statements made in the course of the proceedings or deliberations provided for under §§ 49-1741—49-1763. [Acts 1957, ch. 13, § 23.]